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SOMETHING OF INTEREST RELATIVE TO MEASURE OF DAMAGES FOR WILLFUL BREACH OF CONTRACT BEFORE TIME FOR PERFORMANCE ARRIVES.

This is a question upon which there are many opinions by many courts. In some instances the correct measure of damages is given without stating the principle upon which the courts have rested their opinions. We call particular attention to the fact that the subject of this discussion relates to willful breaches of contracts and not to those cases where parties have been prevented from carrying out their contracts through no intention to break them. The position we take is that in those cases where there is a willful intention evinced not to perform the contract, the measure of damages should be based upon the same principle as in those cases where there is fraud or gross negligence. Contracts must be held sacred and the law ought not to tolerate a deliberate and willful evasion of them, and when the opinions are examined it will be found that the best of them sustain our view.

As an illustration we will take the case of Hochster v. De la Tour, 2 E. & B. 678. In that case the plaintiff had entered into a contract to serve the defendant as a carrier for three months, beginning June 1, 1852. On May 11th the defandant notified the plaintiff that his services would not be accepted. The plaintiff brought an action and got a judgment before the time for performance was to begin by the terms of the contract. It was argued by the defense that the plaintiff having taken other employment had terminated the contract. The conclusion was that "the situation would be unfortunate if the plaintiff, as a condition of getting a right of action, must decline other employment and hold himself ready to perform till June 1st." In the 3d Ed. of Wald's Pollock on Contracts, by Professor Williston, p. 360, the conclusion of Lord Campbell, who wrote the opinion, seems to be regarded as a misapprehension on his part, rendering the opinion an unsatisfactory one. On page 361 we find the learned authors of this most valuable work saying that while "every consideration of justice requires that repudiation or inability to perform should excuse the innocent party from performing," * * * "it does not follow from this that he has an immediate cause of action." We conclude that the fact that the breach was a willful one and without excuse was not regarded as the element which was the real basis of the right to bring an action at once. The deliberate and willful intention to repudiate the contract brought the tort element into the breach and it was no doubt part and parcel of the deliberation which lead Lord Campbell to the conclusion that, in such a case, there should arise an immediate right of action. The learned authors base a distinction on a fixed future day, and a day which may be fixed at any time in the present or future, illustrated in Low v. Harwood, 139 Mass. 133. At any rate the majority of the states are shown to have followed Hochster v. De la Tour. See Wald's Pollock on Contracts, 3d Ed. 361, note 13, where a comprehensive view of the two situations are most fairly given.

In Missouri, in the case of Breen v. Fairbank, 35 Mo. App. 212, it was held, in an action by an employee under a contract for personal services for a specified period, to recover after his wrongful discharge, the fact that the employee has found, or by reasonable effort might have found, other employment during the contract period, "is a matter of defense to be shown by defendant in mitigation of damages." This case is certainly against the doctrine of Hochster v. De la Tour, and not consistent with Bignell, etc., Mfg. Co. v. Pierce, etc., Mfg. Co., 59 Mo. App. 673, or Claes Mfg. Co. v. McCord, 65 Mo. App. 507.

The Breen case, *supra*, does not present a case where the duty of the plaintiff requires him to mitigate defendant's damages, for if the defendant has suffered damage it is the result of his own wrong, and he cannot complain because the plaintiff has sought other sources of employment. To hold the defendant to his contract in such a case, without any consideration of mitigating the damages, gives strength to the fact that the law is made to prevent wrongs and takes everything against the willful wrong-doer. The plaintiff's right to recover under such circumstances is the profit he would have made by full performance.

A case which illustrates the class of cases where there has been a willful breach and in which the plaintiff should not do anything further to enhance the damages to which the plaintiff might be subjected by full performance after having been informed that the defendant would not be bound by his contract, is that of Robling Son's Co. v. Lockstitch Fence Co., 130 Ill. 660, which was wrongly decided. In that case the defendant, a resident of Illinois, had contracted to buy 500 tons of wire of the plaintiff, resident in New Jersey. After delivering 120 tons the defendant refused to take any more wire, requesting the plaintiffs to stop shipping. The plaintiffs refused the request, and then the defendants telegraphed that they would not take the wire if shipped. In spite of the deliberate order refusing to take the wire, the plaintiffs continued to ship till the whole order was completed and then brought suit to recover, and the Supreme Court of Illinois held them entitled to recover the full price of the wire. The plaintiffs were interested only in the profits which they would have made by the full performance of the contract, and the law ought not to allow a hardship to be endured, and the plaintiffs should not have continued to ship after being notified not to. The circumstances of such a case are such as to intimate a willingness to pay the profits that might have been made.

In the case of Hosmer v. Wilson, 7 Mich. 294, an article was ordered of a manufacturer at a specified price, the work was done and the materials used toward its construction, but before it was completed the order was countermanded and the materials remained in the manufacturer's hands. It was held that the manufacturer could not recover on the common counts the value of such labor and materials, but should sue on the special contract and claim damages for the breach for being wrongfully prevented from performing it, and the measure of damages would be the profit he would have realized from full performance; that he was not bound to complete his work and tender the thing agreed to be furnished after being informed that the defendant would not accept it. These cases seem to us to illustrate the theory upon which the law proceeds or should proceed. The great weight of authority will be found to be with Hosmer v. Wilson. See Wald's Pollock on Contracts, 349.

NOTES OF IMPORTANT DECISIONS.

CARRIERS—REASONABLENESS OF NOTICE IN SHIPPING CONTRACT REQUIRING SHIPPER TO GIVE NOTICE OF INJURY TO STOCK.—In the recent case of Hatch v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. Dak.), 107 N. W. Rep. 1087, it appears that plaintiffs entered into a written contract with the defendant under which a carload of horses was to be carried from the Minnesota Transfer to Harvey, N. D. The plaintiffs claimed that the horses were injured through the defendant's negligence, and that they were damaged thereby in the sum of $504. The written contract was attached to the complaint and made a part thereof. The defendant demurred to the complaint upon the ground that it appears upon the face thereof that it does not state a cause of action. The demurrer was overruled. Defendant appeals from the order overruling it. The contract of shipment contained the following condition or stipulation: "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of said railroad company or its nearest station agent before said stock has been removed from said place of destination, and before said stock has been mingled with other stock." It was claimed that the complaint stated no cause of action because it failed to state that the notice provided for in said contract was given. The plaintiff contended that the condition above set forth was an unreasonable condition, and therefore void. This contention was based upon other portions of the contract, wherein it was stated that the horses are to be "transported from Minnesota Transfer station to Harvey, N. D. station."

The court, in denying this contention of plaintiff, says: "This statement in no way affects the agreement concerning giving of notice. The contract as to shipment was complied with when the horses were delivered at the station. That was the place where the horses were to be unloaded. But the stipulation or agreement as to notice refers to the place of destination. The word "place" in that connection refers to the village of Harvey, and not to the station at Harvey. This is the construction given to the same language used in the contract involved in Welch v. N. P. Ry. Co., 14 N. D.——, 103 N. W. Rep. 396. These conditions or stipulations in shipping contracts are for the benefit of the carrier. Their object is to prevent false claims as to injuries received by stock during shipment. If the stock is mingled with other stock before notice of injuries is communicated to the carrier, he is placed at serious disadvantage in determining the facts as to the injuries claimed. The time during which notice must be given is not limited. Unlimited opportunity is given to ascertain if the stock is injured. The stipulation does not limit the carrier's

liability. It simply requires notice to be given that injuries have occurred, before the stock is moved away or mingled with other stock. The shipper is deprived of no right. We are unable to say that the stipulation is an unreasonable one as a matter of law. The following authorities held that similar conditions or stipulations are not unreasonable as a matter of law: Rice v. K. P. Ry., 63 Mo. 314; Express Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. Ed. 556; Goggin v. K. P. Ry. Co., 12 Kan. 416; Sprague v. Mo. Pac. Ry. Co., 34 Kan. 347, 8 Pac. Rep. 465; Hutchinson on Carriers, § 259, and cases cited; Southern Railway Co. v. Adams, 115 Ga. 705, 42 S. E. Rep. 35; Glenn v. Express Co., 86 Tenn. 594, 8 S. W. Rep. 152; Louisville & N. Ry. Co. v. Landers, 135 Ala. 504, 33 So. Rep. 482; Wichita & W. Ry. Co. v. Koch, 47 Kan. 753, 28 Pac. Rep. 1013. The plaintiff further contends that the stipulation is invalid and unenforceable because the complaint shows that it was entered into without consideration. The contention is that some special consideration must have passed between the parties relating to this express stipulation before it becomes binding. This is not true. Conditions like the one in suit become binding and effectual by virtue of the general consideration, for the contract generally, if assented to. It is not a contract limiting defendant's liability. A. & E. Enc. of Law (2d Ed.), p. 300; Crow v. Chi., etc., Ry. Co., 57 Mo. App. 135. It therefore follows that the plaintiff's contentions in favor of the complainant are not tenable. The defendant contends that the complainant must state that the notice of injuries was given before the stock was removed from the place of destination, and before it was mingled with other stock. It is further contended in favor of the demurrer that the general allegation of the complaint that all conditions precedent to the right to maintain an action which were imposed by the contract had been fully performed by the plaintiff is not equivalent to an allegation that the notice was given as provided by the contract and that said allegation is simply a statement of a conclusion and not one of fact. Section 5286, Rev. Codes 1899, is relied upon by the plaintiffs in support of the sufficiency of the complaint. That section was construed in Leu v. Ins. Co., 14 N. D.——, 106 N. W. Rep. 59, and it was there held that said section does not authorize a general statement of compliance with conditions imposed by contracts in cases in which such conditions are part of the cause of action as distinguished from conditions precedent. It is not necessary to determine whether that section is applicable to this case or not, as the demurrer was properly overruled upon another ground. The condition or stipulation referred to is not strictly a condition precedent, and it is not part of the cause of action. The cause of action is complete before this condition becomes operative. The cause of action is not created by the contract of the parties. The law controls what facts shall constitute the cause of action. If the law should provide for the notice in the same statute, defining what the cause of action should be, a different question would be presented. But the condition in this case is made by the contract of the parties and the cause of action is defined by the common law. Hence the condition cannot operate as a part of the cause of action. It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action and pertained to the remedy. It was therefore a matter of defense to be raised by answer, if at all. This court has recently so held in a case involving a similar condition. Kinney v. Brotherhood, etc., 14 N. D. ——, 106 N. W. Rep. 44. See also Kahnweiler v. Ins. Co., 97 Fed. Rep. 483, 14 C. C. A. 485; Malloy v. Chi. & N. W. Ry. Co., 109 Wis. 29, 85 N. W. Rep. 130; Gatzow v. Buening, 106 Wis. 1, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; Meisenheimer v. Kellogg, 106 Wis. 30, 81 N. W. Rep. 1033; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300."

HOURS OF LABOR—DANGEROUS AND UNHEALTHY EMPLOYMENTS.

II.

1. *In General.*—One of the highest and most important duties of the state is the preservation of the health and safety of its people. The protection of persons and property from disease, mechanical forces and the elements, calls into play a large amount of state activity. The life, health and property of the citizen is provided for by preventive and other arrangements which is placed at the service of the public. In addition to this the state regulates private action for the same purpose. That the legislature has the power to make all needful regulations in the conduct and management of a business which is attended by danger to health or safety to the employees is no longer an open question.[1] Laws have been enacted in most states designed to secure the protection or safety of persons engaged in dangerous and unhealthy employments. Ordinances have been enacted providing for fire escapes for hotels, theaters, factories and other large buildings; for the inspection of boilers and the securing of passengers from the dangers necessarily incident to elevators and like methods of transportation. In states where manufacturing is carried on to a large extent, provision is made

[1] State v. Cantwell (Mo.), 78 S. W. Rep. 573, collecting cases.

for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of well-holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shortening up of dangerous walls; for ventilation shafts, escapement shafts, means of signaling the surface; for the supply of fresh air, and the elimination as far as possible of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage; that cages shall be covered, and that there shall be fences and gates around the top of the shafts; besides other similar precautions. These statutes have been invariably enforced by the courts of the several states as constitutional measures.[2]

2. *Limiting the Right of Contract for the Protection of the Public Health and Safety.*—While it is very generally settled by judicial opinion that the legislature, in regulating the hours of labor, has no constitutional right to take away all right of contract in the matter where it is sought to protect the employee against the exactions of the employer, the courts or some of them have held otherwise where the statute was intended to protect the safety of the public or the health of the employee from the dangers of excessive and exhaustive labor.[3] In the case of Commonwealth v. Beatty,[4] a Pennsylvania case, it was said: "A prohibition upon unhealthy practices, whether inherently so or such as may become so by reason of prolonged and exacting physical exertion, which is likely to result in enfeebled or diseased bodies, and thereby directly or consequently affecting the health, safety or morals of the community, cannot in any just sense be deemed a taking or an appropriation of property. The length of time a laborer shall be subjected to the exhaustive exertion of physical labor is as clearly within legislative control as is the governmental inspection of boilers, machinery, etc., to avoid accidents, or of the sanitary conditions of factories and the like to preserve the health of laborers. The power to legislate on this subject is inherent in all free governments and is limited only by the constitution."

3. *May Limit Hours of Labor in Dangerous and Unhealthy Employments.*—The weight of authority now seems to hold that laws confined to the protection of that class of people who are subjected to the peculiar conditions and effects attending dangerous and unhealthy employments, like work in bakeshops, underground mines, smelters and works wherein ores are reduced and refined, which limit the hours of employment therein, are not repugnant to the constitution.[5] Such

[2] Holden v. Hardy, 169 U. S. 393, 18 Sup. Ct. Rep. 388, 42 L. Ed. 780.

[3] State v. Cantwell, 78 S. W. Rep. 578; People v. Phyfe, 136 N. Y. 554.

[4] 15 Pa. 5.

[5] State v. Cantwell, 78 S. W. Rep. 569, collecting cases. A law providing that no employee shall be required or permitted to work in a bakery more than 60 hours a week, or more than 10 hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, is a police regulation for the protection of the health of the employees in bakeries, as well as the health of the public, without prohibiting keepers of bakeries from carrying on their business, and is constitutional. People v. Lochner, 76 N. Y. Supp. 396. In this case the court said that the safety and health of a large body of workmen gathered together in one place—a mine, a factory, a workshop—are endangered if proper precautions are not taken by the employer against the source of danger. Everywhere statutes were found requiring employers and owners of buildings used as workshops, and the owners of mines, to do certain things which are declared by statute to be necessary for the protection of workmen. "These regulations," declared the court, "in the main, are reasonable safeguards, and their constitutionality has rarely been questioned." In Short v. Bullion-Beck, etc., Mining Co., 20 Utah, 20 (collecting cases), a statute limiting the hours of labor or period of employment of workmen in all underground mines, smelters and places for reduction of ores, to eight hours per day, except in cases of emergency where life or property is in danger, was held to be a valid exercise of police power, and created for the employee a legislative protection which is without his power to waive. The act was further held to be for the protection of the health and safety of the public. The constitution of Utah (Art. 16, sec. 6), provides that the legislature "shall pass laws to provide for the health and safety of employees in factories, smelters and mines." In the interest of public health, morals and order a state may restrain and forbid what would otherwise be the right of a private citizen. It may limit the hours of employment of adults in unhealthy work and it may be that it can prohibit the performance of excessive physical labor in all callings (People v. Orange Co., etc., Co., 175 N. Y. 84), may limit hours of labor in certain occupations. See St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 207; United States v. Martin, 94 U. S. 400; See also Yick Wo v. Hopkins, 118 U. S. 356; Durant v. Lexington, etc., Co., 97 Mo. 65, 10 S. W. Rep. 484. *Contra*, see *In re* Eight Hour Law, 21 Colo. 29, 39 Pac. Rep. 328; *In re* Morgan, 26 Colo. 415. "There can be no doubt," said the court in State v. Loomis, 115 Mo. 315, 22 S. W. Rep. 350, 21 L. R. A. 789, "but the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees." See *In re* Boyce (Nev.), 75 Pac. Rep. 1.

laws, of course, do not profess to limit the hours of all workmen, but merely those who are employed in the designated pursuits which are deemed detrimental to the health of the employees. None of the cases hold that the legislature may limit the hours of employment in all trades or occupations where the public health and safety is not involved.[6]

"While the general experience of mankind," said the Supreme Court of the United States, in the case of Holden v. Hardy,[7] "may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influences of noxious gases generated by the processes of refining or smelting."

[6] In the leading case upon the right to limit the hours of labor it was said, when considering a law regulating hours of labor in dangerous and unhealthy occupations, that it was not necessary to discuss or decide whether legislatures can fix the hours of labor in other employments. Holden v. Hardy, 169 U. S. 366. See also Atkin v. State, 191 U. S. 207.

[7] 169 U. S. 366. See *Ex parte* Kair (Nev.), 80 Pac. Rep. 463, 467, in which case it was said: "Naturally enough, many of the most ardent opponents of any limitation to the time for labor in unhealthy or unsafe pursuits are actuated more by anxiety to profit by the long hours of toil of others, than by any desire to labor so long themselves, while some of the world's most eminent minds have favored such limitation. Before the invention of many of the most ingenious labor-saving devices with which we are blessed today, and consequently when the effort required to support the world was much greater *per capita* than now, our ever-esteemed patriot, statesman, and philosopher, Franklin, proclaimed that, by the proper or equal distribution of labor, no one would need to toil one-half so long as the time for which petitioner contends. President Harrison, in his annual messages of 1889, 1890, 1891, and 1892, urged upon congress the necessity of requiring appliances to prevent injuries in the coupling and braking of cars engaged in interstate commerce, and legislation to that end was sustained recently by the Supreme Court of the United States in Johnson v. Southern Pacific Company, 25 Sup. Ct. Rep. 158, 49 L. Ed. 363. Count Tolstoi favors the reduction in the hours of labor for employees in factories and mills, and President Roosevelt, in his message to congress last December, advocated a restriction in the hours for trainmen. While governor of New York he recommended and signed a bill which made an eight-hour day for the employees of that state. He and Presidents Grant, Cleveland, and McKinley favored the limitation to eight hours of labor on government works."

Some courts have felt that the proprietors of these establishments and their operators do not stand upon an equality and that their interests were to a certain extent conflicting.[8] The mere fact that both parties are of full age and competent to agree between themselves what shall be considered a day's work does not, it is held, necessarily deprive the state of the power to interfere when the public health demands that one party to the contract shall be protected against himself. "The state," it is said, "still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected the state must suffer."[9]

4. *Same Subject—Holden v. Hardy.*—The decision in Holden v. Hardy, the leading case on this subject, was based partly on the ground that the statute involved was a regulation of the public health, and partly on the ground that the laborer needs to be protected from his employer.[10] The latter view of the court is against the weight of authority. Possibly no one will dispute the statement that wage-earners constitute a very large part of the population of a state. They are clothed with the right of suffrage, and with the help of their vote legislatures are selected. To hold, therefore, that persons are competent to exercise the elective franchise and assist in making legislatures, but are incompetent to make their own contracts in reference to their own labor, is a conclusion which seems at variance with the principles of liberty and equality as found in all our declarations of rights. While all men are equal at the polls they are not, it seems, necessarily so at the counter. The author of a recent work says: "There is an irreconcilable inconsistency in seeking the protection of the law because of inequality in the possession of economic power, and yet proclaiming one's equality before the law. As soon as the law places one for any just reason under a disability, or gives to another a privilege not enjoyed in common by all, protection from oppression becomes a duty of the state, so far as the disability or its cause or the grant of the priv-

[8] State v. Cantwell (Mo.), 78 S. W. Rep. 573.

[9] Holden v. Hardy, 169 U. S. 393, 18 Sup. Ct. Rep. 388, 42 L. Ed. 780; Commonwealth v. Beatty, 15 Pa. 5. *Contra*, see *In re* Morgan, 26 Colo. 415, 47 L. R. A. 52.

[10] Holden v. Hardy, *supra*.

ilege produces or renders the oppression possible. The law can only guarantee to men on a legal plane of equality protection against trespass upon their rights. * * * In this country, where suffrage is universal, and the wage-earners constitute a vast majority of the voters, if they are unable to assert their claims without the aid of the law, they cannot do so with its aid. And thus their inefficacy confirms the unconstitutionality of laws which are designed to protect the workman against the oppression of the employer. Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant except for the purpose of preventing frauds and trespasses." [11]

Los Angeles, Cal. O. H. MYRICK.

[11] Tiedeman, State and Federal Control of Persons and Property, Vol. 2, pp. 942-3.

INDIANS—CUSTOMS AND USAGES OF INDIAN TRIBES AS DETERMINING DESCENT AND DISTRIBUTION OF INDIAN ESTATES.

WALDRON v. UNITED STATES.

United States Circuit Court, D. South Dak., July 1, 1905.

Complainant was a woman of five-sixteenths Sioux Indian blood on her mother's side and had been recognized as a member of a Sioux tribe since her birth. On February 10, 1890, at the time of the taking effect of Act March 2, 1889, ch. 405, 25 Stat. 892, by which a portion of the Great Sioux reservation was ceded to the government, she was residing with her husband and children on lands on the ceded part of such reservation. Within a year thereafter she filed her election to take an allotment of such lands as permitted by section 13 of the act, but her claim was rejected by the land department, on the ground that she was not an Indian, within the meaning of the act, and a trust patent to the land was issued to another member of the tribe who had later settled thereon. Complainant and her children were enrolled on the census, annuity, *per capita*, and issue rolls of her tribe, and had received rations, annuities, and *per capita* payments, the same as all other Indians thereof, and two of her brothers signed the acceptance of the act as members of such tribe. Held, that she was an Indian, within the meaning of the act, and the head of a family, according to the laws and usages of her tribe, her husband being a white man, and as such was entitled to the allotment and to a cancellation of the patent therefor issued to defendant.

CARLAND, District Judge: The above action has been submitted on pleadings and proofs. From the pleadings and proofs the court finds the following facts:

(1) The complainant, Jane E. Waldron, in February, 1889, by the selection of a building site located and, in July of the same year, went upon the land in controversy to reside; said land being described as follows: The S. W. 1-4 of section 28; the N. W. 1-4 of S. E. 1-4 fractional of section 28; the N. E. 1-4 of S. E. 1-4 fractional, section 28; the S. W. 1-4 of N. E. 1-4 fractional, section 28; the S. 1-2 of N. W. 1-4, section 28; the N. E. 1-4 of S. E. 1-4, section 29; and S. E. 1-4 of N. E. 1-4, section 29—all in township 5 N., Range 31, B. H. meridian, South Dakota.

(2) The complainant established her residence upon said land in the month of July, 1889, and has ever since resided thereon with her family, consisting of herself and her husband and children. At the time of the establishment of said residence by complainant said land was a part, and within the limits of, the Sioux Indian reservation in the then territory of Dakota, now South Dakota. That complainant established her residence upon said land with the purpose and intention in good faith of claiming said land as an allotment, under the provisions of Act Cong. March 2, 1889, ch. 405, 25 Stat. 888, was residing thereon February 10, 1890, and had resided upon said Sioux Indian Reservation since the year 1882. Said land is not included within the limits of either of the separate reservations established by said act of congress.

(3) On February 10, 1890, complainant was entitled to receive, and was receiving, rations and annuities at Cheyenne River agency, S. D., and within one year after said 10th day of February, 1890, to wit, on or about the 5th day of September, 1890, said complainant filed for record with the United States Indian agent at the Cheyenne River agency her election to have the allotment of land to which she would otherwise be entitled on one of the separate reservations created by said act of congress of March 2, 1889, upon the land hereinbefore in these findings described, and upon which complainant resided February 10, 1890.

(4) Complainant and her children were enrolled on the census annuity per capita, and issue rolls of the Cheyenne Indian agency, and still are so enrolled as Indians belonging to said agency, and said complainant has received, since 1883, and her children, from time to time as they were born, rations, annuities, and per capita payments in the same manner as all other Indians entitled to receive rations, annuities and per capita payments at said agency.

(5) Mary Van Meter, the mother of the complainant, resided upon said Sioux Indian reservation from 1882 till her death, in July, 1894. Her sons John Van Meter, and Charles Luther Van Meter, her daughter Viola Bentley and her children, Elvira Oaks and her children, and said Mary Van Meter herself, were and are, except those who are deceased, carried upon the census, annuity, and per capita rolls of the Cheyenne Indian agency as Indians, and have received and are receiving rations, annuities and per capita payments, the same as all other Indians under similar conditions. Plaintiff's mother's maiden name was Mary Aungie. She was of five-eighths Indian blood. She was born at the old Ft. George in the Sioux Indian country. Her Indian name was "Cici." Her father's name was Henry Aungie. Her mother's name was Mary Aungie. Complainant's grandmother on the maternal side was one-half Indian blood. When Arthur C. Van Meter married Mary Aungie she (Mary Aungie) was a member of Crazy Bull's band of Yankton Sioux and lived at Sioux Point, near where the Sioux river empties into the Missouri river. Complainant's grandfather Aungie had three-fourths Indian blood. Complainant is five-sixteenths Sioux Indian. Her father was Arthur C. Van Meter, a white man. Complainant was born in 1861 at or near Vermillion. Complainant's grandfather Aungie's mother was a full blood Sioux Indian woman. Complainant's Indian name is "Sutasni." Complainant's mother's family first came to Sioux Point in 1855. Mary Aungie, mother of complainant, drew rations at the Yankton agency when it was established in 1859.

(6) Complainant is and was on February 10, 1890, an Indian, within the meaning of that word as used in section 13 of the act of congress of March 2, 1889, and was on the date first mentioned a member of the Two Kettle Band of the Cheyenne Sioux, and as such Indian was the head of a family, consisting of herself, her husband, and children. There is, and always has been, a uniform custom and law in force among the different bands or tribes of the Sioux Nation of Indians to the effect that where a white man marries an Indian woman, a member of said tribe, the Indian woman becomes and remains the head of the family and is the source from which all annuities, per capita payments, and rations are derived for herself and family. That by this law and custom the right to tribal property is determined by the nationality or race of the Indian mother; the children of the marriage of a white man with an Indian woman taking the race or nationality of the mother, so far as the right to tribal property is concerned. That what is claimed to be the common-law rule, that the children take the race or nationality of the father, does not obtain among the Indians as to the offspring of a white man married to an Indian woman. This custom and law among Indians has been uniformly recognized by the different bands of the Sioux Indians and by the United States. That complainant joined the Two Kettle Band of Sioux Indians at the Cheyenne River agency, was recognized by said band and by the United States as a member thereof. Mary Van Meter, the mother of complainant, drew rations at the Yankton agency after its establishment in 1859. When she died in 1894 she was living upon land allotted to her on the Sioux Indian reservation in South Dakota, under the provisions of the act of congress of March 2, 1889, and was recognized by the Two Kettle Band as an Indian of said tribe. Complainant is of part Indian blood and of Indian descent. Crazy Bull's mother and the mother of complainant were cousins. Crazy Bull was a chief of the Yanktonais and signed the treaty between the United States and the Yankton tribe of the Sioux Indians in 1858, at which time complainant's mother was a member of said tribe.

(7) That whatever settlement was made by the defendant Black Tomahawk upon the land in controversy was subsequent to that of the complainant, and not in good faith, but in the interest of others.

(8) Black Tomahawk was not residing upon the land in question on February 10, 1890. He was on that date a full blood Sioux Indian and was residing on other land at the date specified. He was receiving, and entitled to receive, rations and annuities at the Cheyenne River Indian agency.

(9) The United States on March 28, 1899, issued and delivered to the defendant Black Tomahawk a trust patent for the land in question, under the provisions of section 11 of the act of congress of March 2, 1889, in pursuance of an allotment of said land to said Indian purporting to have been made under the provisions of section 13 of said act on December 8, 1898, and approved by the secretary of the interior, December 10, 1898. The United States has hitherto refused to allot said land to complainant and has authorized and requested said defendant Ira A. Hatch to remove said complainant therefrom by force.

(9 1-2) That the fact that an Indian child was born outside an Indian reservation does not affect the right of the child to tribal property according to the laws and customs of the Sioux Nation.

(10) All the material allegations of complainant's bill are true.

The facts being found to be as above stated, it remains to be ascertained whether, as matter of law, complainant is entitled to the relief prayed for. This action is brought under the provisions of Act Feb. 6, 1901, ch. 217, 31 Stat. 760. The law provides as follows: "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any allotment act or under any grant made by congress or who claim to have been unlawfully denied, or excluded from any allotment on any parcel of land to which they claim to be lawfully entitled by virtue of any act of congress, may commence and

prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States and said circuit courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdiction involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty."

It was held in Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. Rep. 676, 48 L. Ed. 1039, that this act embraces a suit where the facts are as found in this case. Justice Peckham, at page 408 of 194 U. S., and page 678, of 24 Sup. Ct. Rep. (48 L. Ed. 1039), in delivering the opinion of the court, uses this language: "That this act embraces the case of a person situated as was the appellee at the commencement of the suit seems to us so plain as to require no further argument. It is not in any way a retrospective operation which is thus given to the act, except as it applies, by its language, to any one who was then (at the time of the passage of the act of 1894) entitled to an allotment. She claims that she was so entitled to an allotment of the land in question, and that it had been improperly allotted to defendant (appellant) and that the act permits her to assert her claim in the circuit court as against the appellant and to have it adjudged between them. We have no doubt she has that right."

Section 13 of Act Cong. March 2, 1899, ch. 405, 25 Stat. 892, provides: "That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said great reservation not included in either of the separate reservations herein established may, at his option, within one year from the time when this act shall take effect, * * * by recording his election with the proper agent at the agency at which he belongs, have the allotment to which he would otherwise be entitled on one of said separate reservations upon the land where such Indian may reside."

Section 8 of the act gives 320 acres of land to each head of a family. Section 11 provides for the issuance of patents for allotted lands. Section 16 provides that the acceptance of the provisions of said act by the Indians referred to therein should be in manner and form as required by the treaty concluded between the different bands of the Sioux Nation of Indians and the United States, April 29, 1868, 15 Stat. 639. Article 12 of said treaty provides: "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same."

Through commissioners appointed by the United States the provisions of the act of March 2, 1889, were accepted by the Sioux Nations of Indians, and the President of the United States by proclamation fixed February 10, 1890, as the date on which said act should take effect. As between two claimants of public land, it has long been an established rule of law that the first in time is the first in right. Shepley v. Cowen, 91 U. S. 330, 23 L. Ed. 424; Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86; McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. Rep. 176, 30 L. Ed. 408; Hy-yu-tse-kin v. Smith, 194 U. S. 414, 24 Sup. Ct. Rep. 676, 48 L. Ed. 1039. The same rule must obtain in this case. It is not disputed but that complainant established her residence upon the land prior to the defendant, and, if it is, the evidence clearly shows that such is the fact. From the decisions of the General Land Office it appears that the right of complainant to have the land allotted to her was denied solely for the reason that complainant was not an Indian, within the meaning of that term as used in section 13 of the act of congress of March 2, 1889. As the court finds in this case that complainant is an Indian, within the meaning of said act, it is proper that the law affecting this question be referred to in connection with the facts in the case. In the first place, it is necessary to keep in mind that the act of congress of March 2, 1889, does not stand, for the purposes of construction and interpretation, as ordinary laws of congress, so far as the Indians are concerned, for while it appears in form as an independent legislative act of the government, it was and is a treaty or contract made by the United States and the Sioux Nation of Indians. The act was to have no force or effect unless the provisions thereof were accepted by the Sioux nations of Indians in the manner provided by article 12, of the treaty of 1868. The Indians were an ignorant and uncivilized race. They knew little or nothing of the terms of the law which they were to accept except what they were told by the commissioners who negotiated its acceptance. A man who can read cannot be heard to say that he understood a contract to mean something different than its terms imply; but a man who cannot read, and signs a contract on the faith of what the other party to the contract tells him, stands in a very different position. The commissioners of the United States stated to the Indians before obtaining their signatures that the law included mixed bloods as well as full bloods. It must be presumed that congress knew when the law was submitted for acceptance that there were numerous mixed bloods living upon the reservation about to be divided and drawing rations at the different agencies, and it cannot be presumed that these mixed bloods were intended to be deprived of their rights to tribal property by a law that, without their signature, would not have become effective for any purpose. These observations are made for the purpose of showing that the law must be looked at as a contract and construed with reference to the understanding the Indians had of the law at the time they accepted its provisions. Mixed bloods were accepted as going to make up the number of In-

dians necessary to accept the law, and John Van Meter and Charles L. Van Meter, brothers of complainant, signed the acceptance as members of the Two Kettle Band at the Cheyenne agency, and they are referred to in the preamble and attestation clauses of said acceptance as Indians. Senate executive document 51 congress, p. 234, No. 51. When this very case was before the Secretary of the Interior the advice of the then attorney general of the United States, Mr. Olney, was asked as to the status of complainant as an Indian. Under date of February 9, 1894, in a letter addressed to the Secretary of the Interior, Mr. Olney used the following language: "It will be noticed that the act under consideration was dependent for its validity upon the consent of the Indians (section 28). In other words, it was substantially a treaty with the Sioux nation; acts in this form having taken the place of the ancient Indian treaty since the latter was prohibited by act of congress in 1871. By the agreement confirmed in this act the Sioux nation gave up a large amount of territory, and the rights conferred on the nation or on individuals were in consideration thereof. The persons entitled to such rights, are the persons who, at the time of the agreement, constituted the Sioux nation and were lawful members thereof. The question therefore whether any particular person is or is not an Indian, within the meaning of this agreement, is to be determined in my opinion, not by the common law, but by the laws or usages of the tribe. See Western Cherokee Indians v. United States, 27 Ct. Cl. 1-54; United States v. Old Settlers, 148 U. S. 427-429, 13 Sup. Ct. Rep. 650, 37 L. Ed. 509. As to these laws or usages I am not informed and am not qualified to advise." Senate Ex. Doc. No. 59, p. 109, 53 Cong.

This statement as to the proper construction of the act of March 2, 1889, is sound and in entire harmony with the views of this court. In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother. Presumptively a person apparently of mixed blood, residing upon a reservation, drawing rations, and upon the rolls as an Indian, is in fact an Indian. Famous Smith v. United States, 151 U. S. 50, 14 Sup. Ct. Rep. 234, 38 L. Ed. 67. In Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. Rep. 1, 44 L. Ed. 49, it was said by the supreme court: "In construing any treaty between the United States and an Indian tribe * * * the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Sloan v. United States (C. C.), 118 Fed. Rep. 283.

It is held in the case last cited that mixed bloods, who were recognized by the tribe as members thereof, and have been formally declared such by the tribe in council or the equivalent, may properly be given allotments. It is also said in the same case that, upon the question as to whether a person has been so recognized or not, the rulings of the Land Department will be followed. This rule would deprive the complainant in this case of any remedy whatever under the provisions of Act Feb. 6, 1901, ch. 217, 31 Stat. 760, and therefore cannot be accepted as the true rule in all cases. The United States have never, so far as legislation is concerned, recognized the technical rule of the common law in reference to the children born of a white father and an Indian mother. In 1897, congress, in the Indian appropriation Act of that year (Act June 7, 1897, ch. 3, 30 Stat. 90), declared: "That all children, born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such rights." See, also, opinion Atty. General Cushing, 7 Op. Atty. Gen. 46.

In a letter of Commissioner Morgan to the Secretary of the Interior dated April 14, 1890, relative to allotments under the Act of March 2, 1889, now under consideration, the commissioner said: "In carrying out the provisions of the general allotment Act, Indian women married to white men, or to other persons not entitled to the benefit of the Act, are regarded as heads of families and entitled to allotments as such. The same rule should govern in alloting land under the Sioux Act." Senate Ex. Doc. No. 59, p. 115, 53 Cong.

In Davison v. Gibson, 56 Fed. Rep. 445, 5 C. C. A. 545, the circuit court of appeals of this circuit said: "It is common knowledge, of which the court should take judicial knowledge, that the domestic relations of the Indians of this country have never been regulated by the common law of England, and that that law is not adapted to the habits, customs, and manners of the Indians."

The court has considered the cases cited by counsel for defendants wherein, upon certain facts, persons were held not to be Indians; but these cases either seek to invoke what they say was the common law, or are in criminal proceedings. These cases, so far as they seek to invoke the common law to the Indians, are not followed, for reasons herein stated, and, so far as they seek to construe criminal statutes, are inapplicable as there is a wide distinction to be made between the construction of a criminal statute and a contract between a tribe of Indians and the United States.

Without going farther, the court is of the opin-

ion that, under the facts found in this case and the evidence in the record, the complainant is entitled to a decree canceling the trust patent issued to Black Tomahawk, and decreeing that complainant is entitled to have the land in controversy allotted to her by the United States, under the provisions of the Act of Congress of March 2, 1889.

NOTE.—*Customs and Usages of Indian Tribes as Determining Descent and Distribution of Indian Estates.*—The case of Jane E. Waldron v. United States of America, Black Tomahawk and Ira A. Hatch, as Indian Agent at Cheyenne River Agency, 143 Fed. Rep. 413, decided by Judge Carland in the United States Circuit Court for the District of South Dakota, involves the right of a woman of Indian blood, the child of a white man by a woman of Indian blood, born outside of an Indian reservation, but who and whose maternal ancestors for four generations were members of Indian tribes, to an Indian allotment of land under the act of congress of March 2d, 1889, 25 Stat. at Large, 888, the white father being a citizen of the United States at the time of complainant's birth, which allotment had been refused to complainant by the Commissioner of Indian Affairs and the Secretary of the Interior, on the ground that as complainant's father was a white man and a citizen of the United States, the status of the child (complainant) was, under the common law rule as construed by the Land Department, to apply to her case the same as that of her father, and consequently that she was not an Indian but was a white person, and so not entitled, etc. The case was pending before the Commissioner of Indian Affairs and the Secretary of the Interior from 1890 until 1899, when Black Tomahawk, a full-blood Sioux Indian, who contested complainant's right to the land, was granted a trust patent under said act of congress, which patent is under the court decision in question required to be cancelled and a similar patent issued to complainant. Mrs. Waldron married a white man while living in the Indian country, and claimed the land in controversy as the head of an Indian family.

Throughout the long-pending proceedings in the Indian office the claim was made by Black Tomahawk's counsel, in support of the contention that Mrs. Waldron was not an Indian, that the courts had held that one having her status was not an Indian, basing the contention principally upon *Ex parte* Reynolds, 5 Dillon (U. S.), 394, and one or two other similar cases, wherein the right of the federal court to try a defendant upon a criminal charge was involved, and certain *dicta* were indulged in by the courts to the effect that the persons (defendants) before the court were not Indians for the purpose of such trial. None of those cases, however, had anything to do with Indian tribal property rights. And the alleged common law rule under which it was contended that Mrs. Waldron was precluded from an allotment of land, upon the principle of *partus sequitur patrem*, was found by the federal court in the principal case not to apply to complainant. That, on the contrary, the question whether she was or not an Indian within the meaning of the act of congress in question, depended upon the laws and customs of the Sioux Nation of Indians, which adjudication was precisely in line with the opinion of Attorney-General Olney, to whom application had been made by the Indian office during the pendency of the original contest there, for an opinion upon the question of Mrs. Waldron's status in the premises, but which opinion had in effect been ignored by the Indian office.

In the briefs of counsel submitted on behalf of complainant in the federal suit, the authorities and cases upon which *Ex parte* Reynolds purported to be based, viz: Vattel's Law of Nations, 101; Ludlam v. Ludlam, 31 Barb. 486, and Shanks v. Dupont, 3 Pet. (U. S.) 242, were analyzed, and it was found that the alleged common law rule of *partus sequitur patrem*, as discussed by those authorities was (as to Vattel's exposition of it) a rule by which a civil society was preservable through the status of citizenship of the father, and as to the views of the courts in the Ludlam and Shanks cases, that the supposed common law rule was itself a very doubtful one, while the illustrations of Vattel in announcing the rule were such as, when applied to communities and nations at large, civilized or barbarous, sustained rather than rejected the contention of complainant, since he declares that "inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country. Bound to the society by their residence, they are subject to the laws of the state while they reside in it. * * * They enjoy only the advantages which the law or custom gives them." And the questions of citizenship discussed by those authorities were found not to be decisive of complainant's right, since aside from the rules of society preservation involved, the federal severalty and allotment laws, as well as some of the Indian treaties, expressly conferred citizenship upon Indians who should sever tribal relations and claim allotments of land.

Accordingly, upon the law and the voluminous proofs, which were all to the same effect upon this phase of the case, Judge Carland found that an immemorial law and custom existed among the bands and tribes of the Sioux Nation of Indians, under which the status and tribal rights of complainant were determined, to the effect that where a white man, whether a citizen of the United States or otherwise, marries an Indian woman of the full or of mixed blood, a member of an Indian band or tribe, he thereby becomes simply a member of an Indian family, and the Indian wife becomes the head of the family and the source of all property tribal rights of the children of such family, such as rations, annuities and *per capita* payments, Indian allotments of land, etc.; that the alleged common law rule does not apply, etc. The further question whether mixed-bloods were "Indians" within the meaning of said act of congress, was also involved, the Indian office having held that as some of Mrs. Waldron's ancestors had received "Sioux Half breed Scrip" under the treaty of 1830 and the act of congress of 1854, therefore they were not "Indians," and that by consequence she was not one. This contention was discredited by the court, however, as mixed-bloods were, under all of the proofs submitted and by the federal authorities when dealing with the Sioux Indians in procuring their assent to said act of March 2d, 1889, shown to be and regarded as Indians for all purposes of Indian benefits. A declaratory statute inserted in the Indian appropriation act of June 7, 1897, and referred to in the opinion of the court, was invoked on behalf of Mrs. Waldron before the Indian office, but without avail, it being there decided that such provision was not applicable, because not applying in terms to complainant, while Judge Carland holds such law applicable.

Another and important question—one of procedure—was also involved in this suit, viz: whether the Indian office having, as it was alleged in the answer to

the bill of complaint, decided adversely to Mrs. Waldron on the facts, she was barred by the departmental adjudications, it being also alleged in the answer that the cause was fully heard in the Land Department, and that no fraud or mistake in those proceedings were alleged in the bill of complaint, and that those proceedings were *res adjudicata*. This contention was overruled by the court, it being held that the rule contended for would "deprive complainant in this case of any remedy whatever" under the act of congress of August 15, 1894 (28 Stat. at Large, 305), as amended by act of February 6, 1901 (31 Stat. at Large, 760), which laws for the first time in the history of American jurisprudence conferred upon the federal courts jurisdiction to "try and determine any action, suit or proceeding arising within their respective jurisdiction, involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty" where the title yet remains in the United States.

The land involved in this suit is situated upon the ceded portion of the former Great Reservation of the Sioux Nation of Indians in Stanley county, South Dakota, being 320 acres adjoining the town site of Fort Pierre. The decision is far reaching in its application to mixed-blood Indians wherever located and under whatsoever law or treaty they may claim.

Pierre, S. Dak. CHAS. E. DELAND.

[We do not know of a more important decision affecting our Indian wards than the decision of the court in the principal case. Especially is it noteworthy that the learned judge should have emphasized the rule of law which protects ignorant persons from the effects of a strict literal construction of written contracts into which they are induced to enter by parties who afterwards desire to take advantage of them. The Sioux Indians had implicit faith in the emissaries of the federal government in the execution of the treaty referred to in the principal case, and we certainly have occasion to rejoice that the federal court has effectually prevented the surprising attempt of the Land Department to deprive a large part of our Indian population of their just rights under the treaty. The further holding of the court, to-wit, that the law of descent and distribution among Indian tribes shall be determined by the usages and customs existing among the tribal members and not by the common law, will be hailed as indeed the fairest rule to obtain among a class of people who are ignorant of our laws.—ED.]

JETSAM AND FLOTSAM.

DEADLY WEAPONS.

The Honorable Duff Merrick, a prominent Asheville lawyer who was arraigned before a magistrate upon a charge of assault on one D. M. Melton, with a deadly weapon, to-wit, a street car, is not receiving his just mead of attention from the paragraphers. The complaint in effect was that the said Merrick, late of the State of North Carolina, did violently, with force and arms, feloniously with malice aforethought, etc., etc., lay hands upon the said Melton and feloniously attempt to place the said Melton in front of a rapidly moving street car, with the intent, etc., of converting the said Melton into a memory as aforesaid. The magistrate, however, held that only a simple assault had been committed and Mr. Merrick was let go with a fine of $20 and the costs.

We are not familiar with the evidence in this case, but we trust that it was upon the evidence and not upon the charge that the magistrate based his decision. An assault with a street car cannot be termed a simple offense. By the same token of reasoning there is no question but that a street car is a deadly weapon. If Mr. Merrick, in the heat of his anger, attempted to force the shrinking person of Mr. Melton into dangerous juxta-position with a rapidly moving car, he was certainly guilty of the offense charged. To declare otherwise would be to put homicide upon the easy basis of mere ingenuity in the use of inanimate or impersonal agencies of destruction. This is against the policy of the law which, broadly, is ever inclined to look to the intent. It does not follow that a man should have the absolute control of the agency to whose mercy he subjects his victim. As recently happened in New York a boy was tied to a pole in a swamp and left at the mercy of a horde of deadly mosquitoes. Surely the insects in such a case were a "deadly weapon," although they acted upon their own initiative. A street car or an automobile running at high speed are always to greater or less degree out of the control of those who run them, and to throw a gentleman in their path, if it would be murder in the case of death, would seem to be assault with a deadly weapon in case the fell design is not successful. It is to be hoped that Mr. Merrick had no such purpose as that attributed to him with respect of Mr. Melton, but if he had he assuredly chose a weapon which was calculated to do execution.

The law, which oftentimes led into technical digression away from justice, can generally be depended upon to look at a thing in the right way. Sometimes, of course, as where the engine and the bull yearling combined to commit an assault upon Colonel Wadlington while the latter was following the pursuit of Isaac Walton in a pool under the embankment breaking his leg, there was a lack of motive and an unusualness of circumstance which caused the courts to deny him either damages or criminal redress. But that is a classic wrong upon a peaceful citizen, which is not often paralleled. Courts on the other hand have repeatedly decided that such things as bull-dogs and mules, when turned at large with intent to injure or recklessly are "deadly weapons." In that the courts follow the rule of law, being the refinement of common sense. What more effective death than to tie a man to the retrousse portion of a mule? Even the forces of nature when maliciously employed may become deadly, although they be not concealed weapons.

We mind one instance of a civil suit for damages, which is often recounted by a North Carolina judge, in which the complainant approached on the highway his neighbor's mule hitched to the fence. The wayfarer knew the mule and, as the road was narrow, approached cautiously. After a preliminary examination of the ground, he concluded that there was room to pass. The subsequent proceedings, however, precipitated the litigation. On the stand he recounted the circumstances in detail. "Did he kick you?" he was asked. The witness, though wronged, was an honest man: "I don't want to say that which I disremember," was his reply, "but the next thing I knew they were a-washing of my head in the branch!"

The true rule of deadly weapons as of other tests is the old application of "cause and effect."—*The Daily (N. Car.) Observer.*

BOOKS RECEIVED.

Probate Reports Annotated: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By Wm. Lawrence Clark, Author of Clark on Contracts, Clark and Marshall on Corporations, etc., Vol. 10. New York. Baker, Voorhis & Company, 1906. Price $5.50. Review will follow.

HUMOR OF THE LAW.

A man came into the police court the other day carrying a friend on his back. "What's the matter?" asked the judge. The man answered, "Judge, this man is a friend of mine, and his name is Gunn. Now, Gunn is loaded. I know that it is against the law to carry a loaded gun on the streets, so I brought him in here." The judge said: "Gunn, you are discharged." And the next day the report was in the papers.

Buying a box of cigars worth £ 3, an astute Yankee insured the cigars against fire for £ 5. Then he smoked them and claimed the insurance money. The insurance company, however, knew a trick worth two of that. They are meeting his demand by suing him for damages for wilfully burning the cigars with intent to defraud them.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL — Death of Husband. — Where an action was properly brought by husband and wife joining, as parties plaintiff, and the husband died pending the action, it was proper to substitute his administratrix.—Gomez v. Scanlan, Cal., 84 Pac. Rep. 50.

2. ACCOUNT—Right to Results of Servant's Labor.—An alleged right of a corporation to recover profits earned by another corporation by use of a model which plaintiff claimed as its property held barred by lapse of time. —New York Automobile Co. v. Franklin, 97 N. Y. Supp. 781.

3. ADJOINING LANDOWNERS—Excavations. —In an action for injuries to buildings by excavations in adjoining land, whether the injuries were the result of the removal of lateral support or blasting operations held for the jury.—Farnandis v. Great Northern Ry. Co., Wash., 84 Pac. Rep. 18.

4. AGRICULTURE—Liens.—Holder of agricultural lien must apply proceeds of sale of crops for lien to lien debt.—Barfield v. J. L. Coker & Co., S. Car., 53 S. E. Rep. 170.

5. APPEAL AND ERROR—Action for Rents and Profits.—In an action to recover rents and profits, the supreme court cannot accept amount found by jury as conclusive and direct judgment therefor, when new trial has been granted and the evidence is conflicting. — Scott v. Sloan, Kan., 84 Pac. Rep. 117.

6. APPEAL AND ERROR — Ancillary Sequestration.—Where the trial court issued an ancillary sequestration after the main suit had been transferred to the appellate court, the decision of the main suit on appeal did not operate as a decision on the sequestration.—Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, La., 40 So. Rep. 727.

7. APPEAL AND ERROR—Appealable Orders.—An appeal will not lie from an order at chambers extending time to answer after default, where no abuse of discretion is shown.—Bell v. Western Union Telegraph Co., S. Car., 53 S. E. Rep. 177.

8. APPEAL AND ERROR—Findings of Fact.—A finding of fact will not be reversed in the absence of a clear preponderance of evidence against it; no rule of law having been ignored or misapplied.—*In re* Arneson's Will, Wis., 107 N. W. Rep. 21.

9. APPEAL AND ERROR — Harmless Error. — Where a contract was construed by plaintiff and by the court in a certain manner, it was not error to exclude evidence in support of such construction.—Great Falls Meat Co. v. Jenkins, Mont., 84 Pac. Rep. 74.

10. APPEAL AND ERROR—Pleading.—The granting of a motion to strike out one of the demises laid in a declaration in ejectment was harmless, where the proof did not connect plaintiff with the title of the party named in such demise.—Wilson v. Hammond, Ala., 40 So. Rep. 343.

11. ASSISTANCE, WRIT OF—Laches.—An objection that an application for writ of assistance to put a purchaser at judicial sale in possession has been too long delayed is addressed to the sound discretion of the court.—Clark & Leonard Inv. Co. v. Lindgren, Neb., 107 N. W. Rep. 116.

12. ATTORNEY AND CLIENT—Amount of Compensation. —The amount contracted to be paid for attorney's services will not be reviewed by the courts, in the absence of evidence evincing a purpose on the part of the attorney to obtain an improper advantage of his client.—Burke v. Baker, 97 N. Y. Supp. 768.

13. ATTORNEY AND CLIENT—Disbarment of Attorney.—Misconduct of attorney in refusing to pay over money collected for his clients held ground for disbarment.—People v. Nicholas, Colo., 84 Pac. Rep. 67.

14. ATTORNEY AND CLIENT—Ratification of Attorney's Act.—A ratification of a creditor of the act of her attorney in receiving a conveyance from a wife of her interest in land mortgaged by her and her deceased husband in payment of the debt due to the creditor is binding on the mortgagee.—Sawyer v. Vermont Loan & Trust Co., Wash., 84 Pac. Rep. 8.

15. ATTORNEY AND CLIENT—Settlement of Case by Client.—Where plaintiff settles a cause of action, it is not necessary that the same be in writing or filed, or that defendant notify the plaintiff's attorney of such settlement.—Olson v. Sargent County, N. Dak., 107 N. W. Rep. 48.

16. BANKS AND BANKING—Payment After Notice Not to Pay.—A depositor in an action against a bank, the defense to which was payment of a check, held entitled to show verbal notice not to pay given before the payment. —People's Sav. Bank & Trust Co. v. Lacey, Ala., 40 So. Rep. 346.

17. BENEFIT SOCIETIES—Occupation.—An occasional sale of liquor held not to render an employee a bartender within by-laws of an insurance order forfeiting

the certificate of member so employed.—Stevens v. Modern Woodmen of America, Wis., 107 N. W. Rep. 8.

15. BILLS AND NOTES—Evidence.—In an action on a note for a large amount, purporting to have been given by one since deceased, evidence that plaintiff was financially embarrassed about the time the note was given held admissible.—Haines v. Goodlander, Kan., 84 Pac. Rep. 986.

19. BILLS AND NOTES—Innocent Purchaser.—In an action on a note secured by a second mortgage, the fact that plaintiff purchased the note for less than its face held not to deprive him of the right to enforce the same as an innocent purchaser for value.—Lassas v. McCarty, Oreg., 84 Pac. Rep. 76.

20. BROKERS—Action for Commissions.—Where a real estate agent is employed to sell lands and procures a purchaser, and the owner refuses to complete the sale because the property belongs to another, and the employment is denied, it is too late after action begun to urge as an additional reason that the purchaser was not able to pay.—Stanton v. Barnes, Kan., 84 Pac. Rep. 116.

21. BUILDING AND LOAN ASSOCIATION—Usurious Contracts.—Where a loan by a Minnesota savings and loan company was subject to construction according to the Minnesota laws, the fact that a premium was paid for the loan did not make it usurious under Gen. St. Minn. 1894, § 2794.—Beckley v. United States Savings & Loan Co., Ala., 40 So. Rep. 655.

22. CANCELLATION OF INSTRUMENTS — Mortgages. — Equity will not cancel a mortgage, securing an unpaid debt, at the suit of the mortgagor or one standing in his shoes, when the only ground for relief is that limitations are a defense to its foreclosure.—Tracy v. Wheeler, N. Dak., 107 N. W. Rep. 68.

23. CARRIERS—Bill of Lading.—A bill of lading issued by an express company is a contract binding the shipper in the absence of misrepresentation, fraud or concealment.—Hoffman v. Metropolitan Express Co., 97 N. Y. Supp. 838.

24. CARRIERS — Classification Sheets. — In construing classification sheets, the intent of the framers as to the meaning of words used, when it can be ascertained, should be given effect, regardless of the intent of the shipper or of the local usages.—Smith v. Great Northern Ry. Co., N. Dak., 107 N. W. Rep. 56.

25. CARRIERS—Duty to Transport Goods —A common carrier, able and accustomed to transport intoxicating liquors from one city to another, cannot lawfully refuse so to do because of the passage by one of the cities of an invalid ordinance prohibiting the transportation and delivery of liquor within the city without the payment of a license fee.—Southern Express Co. v. R. M. Rose Co., Ga., 53 S. E. Rep. 185.

26. CHATTEL MORTGAGES — Conversion. — A chattel mortgage held not guilty of conversion in removing the mortgaged property to a different place from that where it was seized for the purpose of sale.—Croze v. St. Mary's Canal Mineral Land Co., Mich., 107 N. W. Rep. 92.

27. CHATTEL MORTGAGES—Powers of Receiver.—A receiver in possession of mortgaged chattels held not entitled to sell the same without public notice, in the absence of the mortgagor's consent, as required by Rev. St. 1898, § 2316a.—Bekkedal v. Johnson, Wis., 107 N. W. Rep. 5.

28. CLUBS—Liability for Negligence. — Incorporated athletic club held liable to members for negligence.—Beecroft v. New York Athletic Club of City of New York, 97 N. Y. Supp. 831.

29. CONTEMPT—Civil Remedies.—Where execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to.—Carnahan v. Carnahan, Mich., 107 N. W. Rep. 73

30. CONTEMPT — County Commissioner's Court. — A county officer in possession of a room in the courthouse held not guilty of contempt in refusing to vacate pursuant to the order of the county commissioners' court.—Watson v. Scarbrough, Ala., 40 So. Rep. 672.

31. CONTEMPT—Order to Show Cause.—An order requiring an attorney to deposit money received as attorney for plaintiff in an action held unauthorized on an order to show cause why he should not be adjudged guilty of contempt, served on his counsel. — Weeks v. Coe, 97 N. Y. Supp. 704.

32. CONSTITUTIONAL LAW—Colleges and Universities.—Where a state incorporated an agricultural college which was a public corporation, the fact that thereafter property was devised, bequeathed, or given to it did not deprive the state of its right to repeal the act incorporating it.—State v. Irvine, Wyo., 84 Pac. Rep. 90.

33. CONSTITUTIONAL LAW—Intoxicating Liquors.—An ordinance prohibiting one licensed to sell intoxicating liquors from allowing any persons in the place where the liquors are sold during certain prohibited hours does not infringe any right secured by the constitution of the United States.—State v. Calloway, Idaho, 84 Pac. Rep. 27.

34. CONSTITUTIONAL LAW—Property Rights.—Gen. Acts 1903, p. 320, § 9, authorizing an entry on land to make a preliminary survey of a railway right of way, held not unconstitutional as a deprivation of property without due process of law.—State v. Simons, Ala., 40 So. Rep. 662.

35. CONTINUANCE—Absence of Counsel.—It was not an abuse of discretion to deny a continuance for absence of counsel in the absence of a showing that other professional advice was unavailable, and that the applicant's defense could not be effectively presented without the presence of the absent attorney. — Berentz v. Belmont Oil Co., Cal., 84 Pac. Rep. 47.

36. CONTRACTS—Bond for Title.—An agreement whereby one of the parties binds himself to make to the other a bond for title, with no obligation on the other party, is not bilateral.—Kaplan v. Whitworth, La., 40 So. Rep. 723.

37. CONTRACTS — Consideration. — A contract to pay plaintiff $1,800 a year for life in consideration of services rendered deceased in her lifetime held not voidable because such amount was in excess of the reasonable value of the services.—Parsons v. Teller, 97 N. Y. Supp. 808.

38. CONTRACTS—Defective Work.—Where a building contract required written notice to the contractor of any alleged defects, oral notice to the contractor was insufficient to amount to an objection.—Sweatt v. Hunt, Wash., 84 Pac. Rep. 1.

39. CONTRACTS—Duress.—Free assent of parties being an essential to a valid contract, duress by threats or other acts by which the free will of a party is restrained and his consent induced will render the contract void.—Whitt v. Blount, Ga., 53 S. E. Rep. 205.

40. CONTRACTS—Illegality.—In action by stockholder to recover from another stockholder money received under a secret agreement with corporation purchasing their corporate property, exclusion of evidence tending to show existence of illegal contract held error.—Erpelding v. McKearnan, Mich., 107 N. W. Rep. 197.

41. CONTRACTS—Mental Capacity.—Public policy will not permit a child who sues for the appointment of a guardian for her mother for mental incompetency to make the abandonment thereof a source of profit to herself.—Simmons v. Kelsey, Neb., 107 N. W. Rep. 122.

42. CORPORATIONS—Director Engaging in Competitive Business.—A director of a corporation owes no duty to the corporation not to engage in a similar business after severing his connection with the corporation. — New York Automobile Co. v. Franklin, 97 N. Y. Supp. 781.

43. CORPORATIONS—Disposition of Assets.—Individual incorporators of a street railway company held not entitled to object that plaintiff had no capacity to sue to restrain an alleged fraudulent sale of the corporation's franchise or assets because no stock had actually been issued to him.—Mulvihill v. Vicksburg Ry., Power & Mfg. Co., Miss., 40 So. Rep. 647.

44. CORPORATIONS — Right of Creditor to Have Receiver Appointed. — A simple contract creditor whose claim is not controverted is entitled to the appointment

of a receiver of a debtor corporation on a mere showing of insolvency.—Davis v. Consolidated Coal Co., Wash., 84 Pac. Rep. 22.

45. CORPORATIONS — Stockholder's Liability for Corporate Debts.—Original incorporators, paying for stock, with interest, in solvent corporation, held liable to the creditors of the new corporation for the amount of their subscriptions.- Dieterle v. Ann Arbor Paint & Enamel Co., Mich., 107 N. W. Rep. 79.

46. COSTS—Taxation of Term Fees.—The taxation of a term fee over plaintiff's objection that the case was then not at issue held improper.—Fuller Buggy Co. v. Waldron, 97 N. Y. Supp. 730.

47. COUNTIES—Contempt.—The county commissioner's court has no power to put out by force an officer of another court occupying a room in the court house for his office.—Watson v. Scarbrough, Ala., 40 So. Rep. 672.

48. CRIMINAL EVIDENCE — Evidence [Improperly Obtained.—A statement by defendant as a witness that he voluntarily took off his shoes while in jail and handed them out for examination held to cure any error in the admission of evidence describing the shoes in the first instance.—Moss v. State, Ala., 40 So. Rep. 340.

49. CRIMINAL EVIDENCE—Homicide. — Accused held not concluded by his own testimony that he was not angry when deceased received the injuries from which she died, so as to authorize refusal of instructions on manslaughter in the second and fourth degrees, under Rev. St. 1898, §§ 4350, 4362, justified by other evidence.—Montgomery v. State, Wis., 107 N. W. Rep. 14.

50. CRIMINAL LAW—Abstract Questions.—An appeal by the state from an order quashing a panel of petit jurors presents merely an abstract question where defendants cannot now be tried by such array, and will be dismissed. —State v. Henderson, S. Car., 53 S. E. Rep. 170.

51. CRIMINAL TRIAL—Failure to Request Instructions. —Omission to define the phrases "concealed weapons," and "disturbance of the peace," as used in a charge, in the absence of a request, does not constitute error.—Johnson v. State, Fla., 40 So. Rep. 678.

52. CRIMINAL TRIAL—Irregularities in Drawing Jury.— A defendant who accepts without protest or challenge jurors tendered waives any errors or irregularities in the drawing, summoning, and impaneling of such jurors.—Douberly v. State, Fla., 40 So. Rep. 675.

53. CRIMINAL TRIAL — Newly Discovered Evidence.— Where on motion for a new trial accused tenders affidavits as to newly discovered evidence, it is proper to grant the solicitor general time to procure an affidavit in rebuttal.—Collins v. State, Ga., 53 S. E. Rep. 193.

54. CRIMINAL TRIAL - Remarks of Counsel.—An improper remark of counsel in the heat of argument held not prejudicial error when he subsequently asked the jury to disregard anything not based on evidence, and the court charged the jury to disregard all such statements on either side.—State v. Feazeli, La., 40 So. Rep. 698.

55. CRIMINAL EVIDENCE—Res Gestæ.—A motion to exclude a statement by a witness, constituting a part of the *res gestæ* of the occurrence, and made in the presence of defendant, is properly overruled.—Simmons v. State, Ala., 40 So. Rep. 660.

56. DAMAGES—Breach of Contract to Organize Corporation.—In an action for breach of contract to organize a corporation and issue stock, the estimated value of the stock if issued held not the measure of damages within Civ. Code, § 3300.—Eisenmayer v. Leonardt, Cal., 84 Pac. Rep. 43.

57. DEATH — Action by Personal Representatives. — Though Code Ga. 1895, § 3828, provides that a widow may recover for the wrongful death of her husband, an action in South Carolina for death in Georgia should be brought by the personal representative.—Bussey v. Charleston & W. C. Ry. Co., S. Car., 53 S. E. Rep. 165.

58. DEDICATION—Streets.—Where nearly all the lines drawn on a map filed by the owner of an addition were solid lines, it cannot be presumed that the streets that were marked with dotted lines were not dedicated to the public as well as the others indicated by solid lines.—Flournoy v. Breard, La., 40 So. Rep. 684.

59. DEEDS—Conditions Subsequent.—Where the intent of the parties to a deed is clear, their rights and liabilities in respect to any condition in the deed are enforced as in other contracts.—Hamel v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 107 N. W. Rep. 139.

60. DESCENT AND DISTRIBUTION — Death of Wife.— Where a wife, owning certain real estate, dies intestate, and leaves as her heirs a husband and several grandchildren by a former marriage, the husband inherits a one-half interest in the land and the grandchildren the other one-half.—Oliver v. Sample, Kan., 84 Pac. Rep. 128.

61. DESCENT AND DISTRIBUTION—Rights of Husband.— Where the legislature has provided that a husband shall inherit from his deceased wife, he is not disinherited because he feloniously killed his intestate wife for the purpose of acquiring her property.—McAllister v. Fair, Kan., 84 Pac. Rep. 112.

62. DOMICILE—Minor Heirs.—In the absence of proof to the contrary, it will be presumed that the minor children and heirs of a deceased person were residents of the place where decedent resided at the time of his death. —*In re* Bunting's Estate, Utah, 84 Pac. Rep. 109.

63. DOMICILE—What Constitutes.—The question of a person's place of residence in determining a motion for a change of venue depends upon his intention as evidenced by his acts and declarations.—Barfield v. J. L. Coker & Co., S. Car., 53 S. E. Rep. 170.

64. DRAINS — Damages.—Where, in action to recover damages by the construction of a drainage ditch, the special benefits received exceed the cost apportioned, the excess may set off against consequential damages.— Gutschow v. Washington County, Neb., 107 N. W. Rep. 127.

65. EJECTMENT—Sufficiency of Petition.—In a suit to recover an estate from one in possession, brought by parties claiming under one of the remaindermen named in a will, an allegation as to other remaindermen held not sufficient to show that neither the remaindermen nor their children had any claim to the land.—Furr v. Burns, Ga., 53 S. E. Rep. 201.

66. EJECTMENT—Suit in Behalf of Another.—Since plaintiff in ejectment must recover on the strength of his own title, he must, if he sues in the name of, or for the use of, another, or the proof shows the legal title to be in the other, connect himself with the title of such other, or he cannot recover.—Wilson v. Hammond, Ala., 40 So. Rep. 343.

67. ELECTION OF REMEDIES—Acts Constituting Election.—The status of parties to a contract of conditional sale held fixed at the time of the execution thereof, and not subject to change by subsequent acts or omissions of one of such parties.—Cooper v. Payne, 97 N. Y. Supp. 863.

68. ELECTION OF REMEDIES—Estoppel.—The doctrine of election of remedies applies only where a party having elected to pursue one of two inconsistent remedies is estopped from afterwards pursuing the other.—Watson v. Perkins, Miss., 40 So. Rep. 643.

69. ELECTION OF REMEDIES—Separate Causes of Action.—Election of remedies does not apply where a complaint states two separate causes of action, one for unlawful seizure of plaintiff's property, and the other for false imprisonment.—Barfield v. J. L. Coker & Co., S. C., 53 S. E. Rep. 170.

70. EMINENT DOMAIN—Injuries to Land.—The carrying away of land by means of water released in a public street held an actual taking of property within the constitution, providing that private property shall not be damaged for public use without just compensation.— Farnandis v. Great Northern Ry. Co., Wash., 84 Pac. Rep. 18.

71. EMINENT DOMAIN—Injury to Trees by Telephone Company.—An owner of land abutting on a street held to possess sufficient title to trees along the street to enable him to sue a telephone company for cutting them

down.—Osborne v. Auburn Telephone Co., 97 N. Y. Supp. 874.

72. EMINENT DOMAIN—Petitory Action.—Where plaintiff alleges his ownership of real property and its occupancy by a railway, and prays that it be made to pay the value of the property if it elects to keep the same, the suit is petitory, and the burden of showing title rests on plaintiff.—Lindner v. Yazoo & M. V. R. Co., La., 40 So. Rep. 697.

73. EQUITY—Allegations of Answer.—Where the answer to a suit in equity is confined to such facts as are necessarily required by the bill, it is responsive to the bill as well when it discharges as when it charges the defendant.—Southern Lumber & Supply Co. v. Verdier, Fla., 40 So. Rep. 676.

74. EQUITY—Dismissal of Bill.—Where bill does not show amount in dispute, and defendant by answer claimed benefits of demurrer, but did not plead inadequacy of amount, it was error to dismiss, under Comp. Laws, § 435, without proof of inadequacy.—Brassington v. Waldron, Mich., 107 N. W. Rep. 100.

75. ESTOPPEL—Ejectment.—Where a grantor of land is not estopped to maintain ejectment held that his grantee is not estopped except for something thereafter done or said by him.—Smith v. Oregon Short Line R. Co., Utah, 84 Pac. Rep. 108.

76. EVIDENCE—Failure to Call Witness.—Where the heirs of a tax debtor were living in the parish when the trial was had, and were not called as witnesses to testify as to his alleged death prior to the tax sale, the presumption is that their testimony would not have aided defendant.—Iberia Cypress Co. v. Thorgeson, La., 40 So. Rep. 682.

77. EVIDENCE—Mental Capacity.—A nonexpert who is an intimate acquaintance of the person whose capacity to contract is the subject of inquiry, though entitled to give his opinion, must testify as to the reason for his belief, as provided by B. & C. Comp. § 718, subd. 10.—Lassas v. McCarty, Oreg., 84 Pac. Rep. 76.

78. EVIDENCE—Summary From Books of Account.—Where book entries or accounts are voluminous or complicated, the testimony of a competent witness who has made an examination and summary of them may be received.—Haines v. Goodlander, Kan., 84 Pac. Rep. 986.

79. EXECUTORS AND ADMINISTRATORS—Compensation.—An administrator cannot receive from the estate any greater compensation than the statutory commissions for his services, however meritorious or extraordinary they may be.—*In re* Krisfeldt's Estate, 97 N. Y. Supp. 877.

80. FALSE IMPRISONMENT—Pleading.—An allegation that plaintiff was arrested, was taken in charge and kept in custody, without reasonable cause, does not imply an arrest under lawful authority.—Barfield v. J. L. Coker & Co., S. C., 53 S. E. Rep. 170.

81. FALSE PRETENSES—Indictment.—On a prosecution for false pretenses, the indictment held not demurrable as not charging in express terms that the defrauded party relied on false pretenses, or was induced by them to part with his property.—State v. Dodenhoff, Miss., 40 So. Rep. 641.

82. FEDERAL COURTS—Following Decisions of State Courts.—The decision of a high state court that a state statute creating a contract is valid may be followed by the Supreme Court of the United States in determining whether the contract obligation has been impaired by subsequent legislation.—Powers v. Detroit, G. H. & M. Ry. Co., U. S. S. C., 26 Sup. Ct. Rep. 556.

83. FERRIES—Free Pontoon Bridge.—A free pontoon bridge, constructed by individuals without authority of the law within a short distance of a public toll bridge, cannot be considered as a private ferry.—Police Jury of Lafourche v. Robichaux, La., 40 So. Rep. 705.

84. FIRE INSURANCE—Action on Policy.—Where, in an action on a policy covering both a building and fixtures, plaintiff advances his claim as an entirety, and is unwilling to divide it by accepting admissions pro tanto of defendant, the claim will be nonsuited.—Melancon v. Phœnix Ins. Co., La., 40 So. Rep. 718.

85. FIRE INSURANCE—Stipulation for Appraisal.—Where a fire policy provides in a case of loss for the appraisal before action brought, a complaint in an action on the policy must allege that the amount of loss has been determined or appraisal waived.—Leu v. Commercial Mut. Fire Ins. Co., N. D., 107 N. W. Rep. 59.

86. FRAUDULENT CONVEYANCES—Assignment of Fund.—The assignment of an assignee to a bill attacking an assignment of a fund as fraudulent must deny notice of fraudulent intent of the assignor as well as fraudulent intent on the part of the assignee.—Dent v. Pickens, W. Va., 53 S. E. Rep. 154.

87. GUARDIAN AND WARD—Sale of Ward's Property.—Guardian held to have power to sell corporate stock specifically devised to wards, where testator's other estate was sufficient to pay his debts.—Cabble v. Cabble, 97 N. Y. Supp. 773.

88. HAWKERS AND PEDDLERS—Reasonableness of Ordinance.—An ordinance providing that peddlers and hawkers shall not cry out for sale products usually sold in the markets, in the streets of a city is not unreasonable.—City of New Orleans v. Fargot, La., 40 So. Rep. 735.

89. HOMESTEAD—What Constitutes.—Where a husband on the death of his wife inherits a one half interest in land, and again marries, and with his wife occupies the land, he acquires no homestead which will prevent his grandchildren from maintaining partition thereof.—Oliver v. Sample, Kan., 84 Pac. Rep. 138.

90. HOMICIDE—Dying Declaration.—Testimony of two witnesses that deceased said to them before he died that he was shot and knew he was going to die was sufficient predicate to render his dying declarations admissible.—Moore v. State, Ala., 40 So. Rep. 345.

91. HOMICIDE—Instructions.—In a prosecution for wife murder, an instruction with reference to a presumption that a husband would not kill his wife, at least with malice aforethought, but would preserve her from harm, etc., held properly refused.—Montgomery v. State, Wis., 107 N. W. Rep. 14.

92. HOMICIDE—Opprobrious Words as a Provocation.—Abusive words, however opprobrious, are not alone sufficient to reduce a homicide from murder to manslaughter.—Kennedy v. State, Ala., 40 So. Rep. 658.

93. HOMICIDE—Threats by Deceased.—Where deceased attempted to kill accused, and announced his purpose so to do the next morning early, proof of events of preceding day and of the threats and of the dangerous character of the deceased was admissible to show the motive with which deceased was entering the room of accused.—State v. Rideau, La., 40 So. Rep. 691.

94. HUSBAND AND WIFE—Real Estate Transactions.—Where a man conveys to his wife land by a warranty deed, and thereafter the property is sold, and his wife receives the consideration and takes a deed to other land and pays therefor by her check on said funds, she is the owner of the last purchased land.—Oliver v. Sample, Kan., 84 Pac. Rep. 138.

95. INFANTS—Ratification of Contract.—Payments made by deceased after she became of age, on a contract executed by her while an infant to pay plaintiff an annuity for services rendered, held a ratification of the contract.—Parsons v. Teller, 97 N. Y. Supp. 808.

96. INJUNCTION—Continued Trespasses.—Where simple acts of trespass prevent or threaten the substantial enjoyment of the possession and property in land, an injunction will be granted.—Sillasen v. Winterer, Neb., 107 N. W. Rep. 124.

97. INJUNCTION—Police Jury.—The police jury of a parish has the right to restrain by injunction the operation of a free ferry or bridge within the prohibited distance from a public toll bridge.—Police Jury of Lafourche v. Robichaux, La., 40 So. Rep. 705.

98. INJUNCTION—Powers of Police Jury.—The police jury need not join its co-owner, a municipal corporation, in a toll bridge, in an injunction suit to restrain the operation of a free bridge, constructed in violation of the statute and an ordinance of the parish.—Police Jury of Lafourche v. Robichaux, La., 40 So. Rep. 705.

99. INSANE PERSONS—Authority of Committee.—Committee of a lunatic held not authorized to ratify a settlement for the cutting of timber on a lunatic's land between the persons cutting the timber and the lunatic's husband and son.—Scribner v. Young, 97 N. Y. Supp. 836.

100. INSANE PERSONS—Mental Capacity.—Where plaintiff reasonably understands the nature of her suit, and has the will to decide for herself whether it shall be prosecuted, she has sufficient mental capacity to maintain it.—Simmons v. Kelsey, Neb., 107 N. W. Rep. 122.

101. INTOXICATING LIQUORS—Druggist's Bond.—In an action against principal and sureties on a druggist's bond for selling liquor to plaintiff's husband, who was killed while under its influence, evidence of excitement at the time of the killing held inadmissible.—Martin v. Fisher, Mich., 107 N. W. Rep. 86.

102. INTOXICATING LIQUORS — Prohibiting Sale.—Acts 1882-83, p. 234 prohibiting the sale of intoxicating liquors in Wilcox county, is not repugnant to the constitution in so far as applicable to the sale of vinous, spirituous, or malt liquors, notwithstanding its unconstitutionality in other respects.—Davis v. State, Ala., 40 So. Rep. 663.

103. INTOXICATING LIQUORS—Reasonableness of Regulation.—Under an ordinance prohibiting the keeper of a saloon from allowing any person other than himself or his family to enter it during certain prohibited hours, it is immaterial for what purpose the proprietor admits such other persons into the building.—State v. Calloway, Idaho, 84 Pac. Rep. 27.

104. JUDGES—Power After Expiration of Term.—Where within the time fixed by the trial judge for settling a case made his successor in office orders an extension, the judge before whom the case was tried may settle and sign the same within such time.—Stanton v. Barnes, Kan., 84 Pac. Rep. 116.

105 JUDGMENT—Bar by Former Adjudication. — An action against one of several joint tort-feasors is not barred unless the judgment rendered in a prior action against another of the tort-feasors has been satisfied.—Reno v. Thompson, 97 N. Y. Supp. 744.

106. JUDGMENT—Enforcement. — Where a judgment has been entered requiring a defendant to surrender possession of certain property, the court has a right to make such orders as are necessary to make the decree effective.—Dixon v. Floyd, S. Car., 53 S. E. Rep. 167.

107. JUDGMENT—Fraud on Court.—In an action to determine adverse claims, it is a fraud on the court and the adverse claimants to not name as defendants all adverse claimants whose names and places of residence could be readily ascertained. — Gilbreath v. Teufel, N. Dak., 107 N. W. Rep. 49.

108. JURY—Challenge for Cause.—A challenge of a juror by the state for cause is not too late when made before the juror is sworn for the trial, though after acceptance by the state of the juror prior to ascertaining his disqualification.—Moore v. State, Ala., 40 So. Rep. 345.

109. LANDLORD AND TENANT—Surrender of Premises. —Lessor, having accepted lessees' surrender of premises and taken exclusive possession thereof, held to have relieved lessees from further payment of rent.—West Concord Milling Co. v. Hosmer, Wis., 107 N. W. Rep. 12.

110. LANDLORD AND TENANT—Tenants' Liability to Sub-Tenant.—Tenants holding property under a ground lease held not liable to subtenants for injuries sustained through the fault of defendant railroad companies.—Farnandis v. Great Northern Ry. Co., Wash., 84 Pac. Rep. 18.

111. LIBEL AND SLANDER—Innuendo. — A publication referring generally to trading stamp concerns in a city in which there were several held not libelous as to one of such concerns.—Watson v. Detroit Journal Co., Mich., 107 N. W. Rep. 81.

112. LIBEL AND SLANDER—Maliciously Imputing Want of Chastity.—The malice essential to constitute the offense of maliciously imputing want of chastity to a woman may be inferred.—Cornelius v. State, Ala., 40 So. Rep. 670.

113. LIBEL AND SLANDER—Pleading. — Where a newspaper publishing of a physician that by his great skill he had cured a young woman afflicted with a very serious disease, and the physician sued for libel, held, that the petition stated a good cause of action.—Martin v. The Picayune, La., 40 So. Rep. 376.

114. LIBEL AND SLANDER—Probable Cause.—A litigant who without probable cause makes allegations against his adversary, knowing them to be false, commits a fault within Civ. Code, art. 2315, and cannot escape liability on the score of the allegations having been material to the issue.—Lescale v. Joseph Schwartz Co., La., 40 So. Rep. 708.

115. LIFE INSURANCE — Limitations.—In an action on an insurance policy, certain evidence held admissible on the issue of waiver by insurer of clause of policy requiring action to be brought within six months.—Prudential Ins. Co. v. Hummer, Colo., 84 Pac. Rep. 61.

116. MANDAMUS—Special Interest of Relator.—A merchant held to have such special interest in the performance by an express company of its duty as a carrier as entitled him to a writ of mandamus to compel such express company to accept, transport, and deliver goods.—Southern Express Co. v. R. M. Rose Co., Ga., 53 S. E. Rep. 185.

117. MANDAMUS—To Compel Delivery of Office Books —Where a person holds a certificate of election and has duly qualified, he has such a *prima facie* right to the office as authorizes mandamus to recover the books and papers belonging to the office from his predecessor.—State v. Hyland, Neb., 107 N. W. Rep. 113.

118. MASTER AND SERVANT—Enticing Servant to Break Contract.—Persons who conspire to induce others to break a valid contract of employment are liable to an action therefor.—Thacker Coal & Coke Co. v. Burke, W. Va., 53 S. E. Rep. 161.

119. MASTER AND SERVANT—Independent Contractors. —In an action for the death of an employee, the question whether a third person was the manager of defendant's mill, making defendant liable, or an independent contractor, held for the jury.—Erickson v. E. J. McNeely & Co., Wash., 84 Pac. Rep. 3.

120. MASTER AND SERVANT—Injury to Third Person.— A master is not liable for injuries to a third person by the negligence of his servant while engaged in some act beyond the scope of his employment.—Slater v. Advance Thresher Co., Minn., 107 N. W. Rep. 133.

121. MASTER AND SERVANT—Proximate Cause of Injury.—Though a switchman knowingly violated a rule of the company, it did not prevent a recovery for injurie sustained owing to the engineer having purposely increased the speed of the train.—Louisville & N. R. Co. v. Preston, Ala., 40 So. Rep. 337.

122. MASTER AND SERVANT—Rules Governing Railroad Employees.—The rules of a railroad company held to have contemplated that, if the employee had reported the defect to the conductor, he should be subject to the latter's orders in taking the necessary steps to remedy it.—Southern Ry. Co. v. Holbrook, Ga., 53 S. E. Rep. 203.

123. MINES AND MINERALS—Laborer's Liens. — Payments made by the owner of a mine to a development contractor under a void contract held no defense to the lien of laborers who rendered services in the development of the mine.—Berentz v. Belmont Oil Co., Cal., 84 Pac. Rep. 47.

124. MINES AND MINERALS—Oil Lease.—Where a contract for an oil and gas lease is ambiguous as to what shall constitute a completed well, the conduct of the parties is conclusive.—Smith v. South Penn. Oil Co., W. Va., 58 S. E. Rep. 152.

125. MORTGAGES—Deeds of Trust.—A deed of trust appointing an "acting sheriff" as substituted trustee held to sufficiently disclose an intent to appoint the "acting sheriff" of the county of A., in which the land was situated, and was sufficiently certain in such respect.—Killgore v. Cranmer, Colo., 84 Pac. Rep. 70.

126. MORTGAGES—Foreclosure.—A person acquiring three-fourths interest in land subject to a mortgage held required to pay three-fourths of the debt in order to recover the interest from the mortgagee holding the land as purchaser at a foreclosure sale.—Sawyer v. Vermont Loan & Trust Co., Wash., 84 Pac. Rep. 8.

127. MORTGAGES—Junior Liens.—Where after a foreclosure sale an inferior judgment creditor causes execution to be levied on the land so sold, and procures a sheriff's deed to himself, he acquires no title, and has no standing to complain of any judgment rendered.—Gille v. Enright, Kan., 84 Pac. Rep. 992.

128. MORTGAGES—Merger of Estates.—Where the fee of mortgaged premises is conveyed to the mortgagee, there can be no merger where intervening rights or estates interfere, or where an intention to keep the estates separate can be inferred.—Topliff v. Richardson, Neb., 107 N. W. Rep. 114.

129. MORTGAGES—Sale by Trustee Under Void Appointment.—A sale under a deed of trust by a substituted trustee under a void appointment is void.—Watson v. Perkins, Miss., 40 So. Rep. 648.

130. MOTIONS—Order to Show Cause.—Where a motion is brought before the court by an order to show cause, and the opposite party opposes the motion on the merits, it is improper to deny the motion on the ground that the order was improvidently issued.—Gilbreath v. Teufel, N. Dak., 107 N. W. Rep. 49.

131. MUNICIPAL CORPORATIONS—Assessment for Taxes.—It is presumed that an assessment for taxes was regularly made and in conformity to a valid ordinance, and not in conformity to a subsequent invalid ordinance.—Wohlford v. City of Escondido, Cal., 84 Pac. Rep. 56.

132. MUNICIPAL CORPORATIONS—Multiplicity of Suits.—That a city is attempting to enforce two executions for assessments against two different parcels of land and a third execution against the person will not authorize an injunction on the ground of a multiciplicity of suits, or that the executions constitute clouds on title.—City of Gainesville v. Dean, Ga., 53 S. E. Rep. 183.

133. OBSTRUCTING JUSTICE—Resisting Officer.—In an indictment for resisting an officer arresting a third party, it is not necessary to allege the elements constituting the offense for which the arrest was made.—Johnson v. State, Fla., 40 So. Rep. 678.

134. PARTNERSHIP—Name.—Although a name standing alone would import a corporation, yet where it is designated in a plea as business owned by defendants, such name will be construed as a mere trade name under which defendants are conducting their business.—Whitt v. Blount, Ga., 53 S. E. Rep. 205.

135. PAYMENT—Duress.—Conduct of a reformatory board of managers with reference to a convict labor contractor held not to constitute duress entitling the latter to recover payments voluntarily made.—F. H. Mills Co. v. State, 97 N. Y. Supp. 676.

136. PHYSICIANS AND SURGEONS—Degree of Skill Required.—A physician is only required to exercise such reasonable skill as is exercised by the average of the members of his profession in good standing, in similar localities, and in the same general line of practice.—Dye v. Corbin, W. Va., 53 S. E. Rep. 147.

137. PHYSICIANS AND SURGEONS—Examination for License.—A disappointed applicant for a license to practice medicine cannot apply to the court and there have his answers re-examined, marked, graded, and passed upon as to their correctness by the court.—Raaf v. State Board of Medical Examiners, Idaho, 84 Pac. Rep. 33.

138. PLEADING—Plea of Recoupment.—A plea of recoupment being a cross-action by defendant against the plaintiff, its allegations as to damages must be as specific and certain as if made in a petition.—Whitt v. Blount, Ga., 53 S. E. Rep. 205.

139. PRINCIPAL AND AGENT—Limitation on Apparent Powers of Agent.—A statement of an agent of a corporation to one with whom he was dealing held not to impart a limitation on his apparent power.—California Development Co. v. Yuma Valley Union Land & Water Co., Ariz., 84 Pac. Rep. 88.

140. PROPERTY—Adverse Possession.—Actual possession of a part with title to the whole of a tract of land and intent to possess the whole is possession of the whole, and is continued by mere civil possession, unless ousted by a counter actual possession of one year.—Jones v. Goss, La., 40 So. Rep. 357.

141. PUBLIC LANDS—Settlement and Improvement.—One who settled on school lands with intent of becoming the purchaser, and who improves and occupies the land with his family, has such an interest in the land as will entitle him to maintain an action to enjoin the county treasurer from selling the land.—Schwab v. Wilson, Kan., 84 Pac. Rep. 123.

142. RAILROADS—Apparent Danger.—Where the engineer discovers the driver of a team near the track, he has the right to assume that the driver is in possession of all his faculties, and that he has seen the approaching train.—Chicago, R. I. & P. Ry. Co. v. Clinkenbeard, Kan., 84 Pac. Rep. 142.

143. RAILROADS—Injury to Person on Track.—A person who for convenience walks on the main track of a railroad and takes no precaution for his safety, and is injured, is guilty of contributory negligence.—Limb v. Kansas City, Ft. S. & M. R. Co., Kan., 84 Pac. Rep. 136.

144. RECEIVERS—Grounds for Appointment.—The appointment of a receiver of a corporation pending an action by a stockholder charging fraudulent diversion of corporate assets held not justified by the mere unsupported allegations of the complaint, made on information and belief, and explicitly denied by answer.—Weber v. Wallerstein, 97 N. Y. Supp. 852.

145. ROBBERY—What Constitutes.—It is sufficient to constitute robbery that the property taken was under the personal protection of, though not in actual contact with, the person from whom it was taken.—Hill v. State, Ala., 40 So. Rep. 654.

146. SALES—Breach.—Finding that seller did not deliver goods held not to show obligation of seller to deliver, or breach of contract by him.—Williams v. Wilson & McNeal Co., 97 N. Y. Supp. 731.

147. SALES—Breach of Warranty.—On an issue as to whether shoes sold by defendant to plaintiff were equal to sample, it was not error to permit plaintiff to produce one of the shoes and point out the defects.—Wolfe Bros. Shoe Co. v. Bishop, Kan., 84 Pac. Rep. 133.

148. SALES—Delivery.—Delivery of posters to a bill-posting company not shown to have been the agent of the buyer held not a compliance with the contract, requiring delivery to defendant.—Sackett & Wilhelms Lithographing & Printing Co. v. Tilyou, 97 N. Y. Supp. 749.

149. SHERIFFS AND CONSTABLES—Liability for Costs.—Plaintiff in a suit or in the writ is primarily responsible to the officers of the court for costs at all times, even though the judgment had been rendered in his favor.—Houssiere-Latreille Oil Co. v. Jennings Heywood Oil Syndicate, La., 40 So. Rep. 727.

150. SPECIFIC PERFORMANCE—Adjustment of Rights.—In an action for specific performance, the court will adjust the rights of the parties so as to give to each what he would have received under the contract if there had been no default.—Pillsbury v. J. B. Streeter, Jr., Co., N. Dak., 107 N. W. Rep. 40.

151. STREET RAILROADS—Contributory Negligence.—In an action by a passenger on an electric car for injuries received by contact with a pole supporting the electric wires, evidence held to be conclusive on plaintiff's contributory negligence.—Wichita R. & Light Co. v. Cummings, Kan., 84 Pac. Rep. 121.

152. STREET RAILROADS—Duty Toward Public.—A street railway company comes under certain obligations for the safety of the public, and particularly of its passengers.—Schmidt v. New Orleans Rys. Co., La., 40 So. Rep. 714.

153. STREET RAILROADS—Insolvency.—Current rev-

ennes of a street railway held not divertible from the payment of operating expenses, fixed charges, and current expenses, and applicable to construction and equipment expenses for the purpose of showing that the road was insolvent.—Mulvihill v. Vicksburg Ry., Power & Mfg. Co., Miss., 40 So. Rep. 647.

154. STREET RAILROADS—Rights in Streets.—A street railroad has the right of way, and under ordinary circumstances it is the duty of other travelers using the tracks to yield them to the cars on their approach.—Daniels v. Bay City Traction & Electric Co., Mich., 107 N. W. Rep. 94.

155. TAXATION—Delinquent Taxes.—Where back taxes for three years were assessed on the supplemental roll in 1903, all of the taxes for the four years become delinquent and subject to penalty from the date of the delinquency of the taxes for 1903.—Victoria Lumber Co. v. Rives, La., 40 So. Rep. 382.

156. TAXATION—Payment by Tenant in Common.—Payment by a tenant in common of taxes for the common property under an assessment in his name will render a sale of the co-tenant's interest for taxes in his name for the same year void.—Snodgrass v. Jolliff, W. Va., 53 S. E. Rep. 151.

157. TAXATION—Railroad Stock.—Stock in a railway company whose lines lay outside of the state, of which a domestic corporation was the equitable owner, held liable to be taxed in the state.—Central of Georgia Ry. Co. v. Wright, Ga., 53 S. E. Rep. 207.

158. TAXATION—Tax Deed.—If under any statute the sale on which a tax deed is based may have been legally made on the day named in the deed, the deed will not be held void on its face if otherwise regular.—Clarke v. Tilden, Kan., 84 Pac. Rep. 139.

159. TAXATION—Tax Sale.—A tax sale to the state for taxes due on an assessment against the owner of the land, who does not redeem within a year, vests the legal title in the state.—Iberia Cypress Co. v. Thorgeson, La., 40 So. Rep. 682.

160. TAXATION—Validity of Tax Deed.—Where a tax deed has been recorded for five years, it will not be held void because of omission of express recitals required by statute, if the substance thereof can be supplied by inferences from statements in the deed.—Penrose v. Cooper, Kan., 84 Pac. Rep. 115.

161. TENANCY IN COMMON—Adverse Possession.—Before a tenant in common can rely on an ouster of his cotenants, he must claim the entire title to the land in himself, and must hold exclusive adverse possession.—Schoonover v. Tyner, Kan., 84 Pac. Rep. 124.

162. TRADE UNIONS—Obligation of Members.—The obligation or pledge which a member of a labor union takes is binding only in so far as the purposes of the union are lawful, and where a union attempts an object foreign to the purposes of its organization, or attempts accomplishment of those purposes by unlawful means, the member is not bound by his pledge.—Schneider v. Local Union No. 60, United Assn. Journeymen Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers of the United States and Canada, La., 40 So. Rep. 700.

163. TRIAL—Directed Verdict.—In assumpsit, where there are pleas of general issue and a set-off, and plaintiff introduces no evidence, and there is evidence to support the set-off, it is error to direct a finding in full for plaintiff.—Hillsborough Grocery Co. v. Leman, Fla., 40 So. Rep. 689.

164. TRIAL—Instructions.—The court should not mislead the jury by singling out a particular fact in the case, or unduly emphasize the contentions of either party.—Haines v. Goodlander, Kan., 84 Pac. Rep. 986.

165. TRIAL—Irrelevant Instructions.—A charge inapplicable to the issues will not be cause for a new trial where, in immediate connection therewith, the judge cures the error by instructing that the law which he has announced has no application to the case.—Southern Ry. Co. v. Holbrook, Ga., 53 S. E. Rep. 203.

166. TRIAL—Findings.—Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issue.—Smith v. Dubost, Cal., 84 Pac. Rep. 38.

167. TRIAL—Prejudicial Error.—Misstatement of law with reference to damages plaintiffs were entitled to recover by plaintiffs' counsel in argument to the jury, which was not corrected by an instruction on request, held prejudicial error.—Farnandis v. Great Northern Ry. Co., Wash., 84 Pac. Rep. 18.

168. TRUSTS—Parol Agreement.—A parol agreement by the vendee of a purchaser at a mortgage foreclosure sale to hold title to the land for the benefit of and in trust for the mortgagor held void under the statute of frauds.—Rapley v. McKinney's Estate, Mich., 107 N. W. Rep. 101.

169. VENDOR AND PURCHASER—Fraud.—Fraud inducing the execution of a contract of sale renders it voidable and is available as a ground for rescission or as a defense against its enforcement.—Bennett v. Glaspell, N. Dak., 107 N. W. Rep. 45.

170. VENDOR AND PURCHASER—Recovery of Purchase Price.—In an action for money had and received brought by a vendee to recover the price paid on failure of the vendor to perform, complaint held not subject to demurrer.—Miller v. Shelburn, N. Dak., 107 N. W. Rep. 51.

171. VENDOR AND PURCHASER—Rents and Profits.—Where a deed and contract are placed in escrow, and the grantee complies with the contract and pays the price and interest thereon from the date of the contract, he will be entitled to the rents and profits from such date.—Scott v. Sloan, Kan., 84 Pac. Rep. 117.

172. VENDOR AND PURCHASER—Trust Relations.—The principle that the vendor in an executory contract for the sale of land holds the title as trustee for the vendee and the vendee holds the purchase price as trustee for the vendor, applies only in equity.—Miller v. Shelburn, N. Dak., 107 N. W. Rep. 51.

173. VENDOR AND PURCHASER—Validity of Contract.—Where a future contract is to be a sale or promise of sale of land, and the deferred payments on the price are to bear interest, and the rate of interest is not fixed, the contract is void for want of a fixed price.—Kaplan v. Whitworth, La., 40 So. Rep. 723.

174. VENUE—Enjoining Railroad Commissioners from Enforcing Rates.—An action to enjoin the railroad commissioners from fixing and enforcing certain rates should be brought in the county where one or more of the commissioners reside.—Railroad Commission of Georgia v. Palmer Hardware Co., Ga., 53 S. E. Rep. 193.

175. WEAPONS—Accidental Discharge.—Where persons are gunning together and an accident occurs, the negligence to render one liable must be gross.—Siefker v. Paysee, La., 40 So. Rep. 866.

176. WEAPONS—Breach of the Peace.—Even if the charge of "disturbing the peace" is not included in the offense of breach of the peace, the charge of carrying concealed weapons is, under Laws 1901, p. 57, ch. 4929, made a breach of the peace.—Johnson v. State, Fla., 40 So. Rep. 678.

177. WILLS—Validity Where Prepared from Instructions.—A will prepared from instructions given by the testator will not necessarily be invalid, if by the will, construed in connection with the statutes of inheritance, the property passes to the persons intended.—*In re* Brannan's Estate, Minn., 107 N. W. Rep. 141.

178. WITNESSES—Constitutional Privilege.—In prosecution for assault with intent to murder, cross-examination of accused held not a violation of his constitutional privilege against answering any question which would incriminate himself.—Miller v. State, Ala., 40 So. Rep. 342.

179. WITNESSES—Credibility.—A witness' want of chastity cannot be inquired into for the sole purpose of affecting his or her credibility as a witness.—Baker v. State, Fla., 40 So. Rep. 673.

180. WITNESSES—Credibility.—Where plaintiff offered defendant's servant as a witness, plaintiff could not impeach him, though he might contradict his statements.—Chicago, B. & Q. R. Co. v. Roberts, Colo., 84 Pac. Rep. 68.